Copyright Board
Canada

CANADA

Commission du droit d'auteur
Canada

Ottawa, August 24, 1990

FILE 1990-3
UNLOCATABLE COPYRIGHT OWNERS

Non-exclusive licence to Maclean Hunter Limited to reproduce magazine covers in a promotional calendar.

Reasons for the Order

On August 14, 1990, Maclean Hunter Limited applied under the provisions of section 70.7 of the Copyright Act, ("the Act") for a licence to reproduce fifteen works that had been published on the cover of various issues of Chatelaine magazine between 1928 and 1938. The applicant intends to reproduce the works in a calendar to be sent free of charge, as an incentive to subscribe or resubscribe to Chatelaine magazine.

The applicant submits that the owners of the copyright in these works cannot be located. An exhaustive search of the applicant's records has failed to date to identify the authors or to reveal any form of agreements with them. The applicant has contacted Vis-Art, an organization that collects royalties for a number of visual artists, in the hope that it could identify and locate the owners of the copyright in these works.

The applicant submitted that to the best of its knowledge, the fee for this sort of use is approximately $50 per cover.

The Board contacted Vis-Art for further information. Ms. Edith Yeomans, National Director of the licensing body, confirmed that she had been unable to identify the owners, although she hoped to provide at least a partial answer some time in the future. In a letter dated August 22, 1990, Vis-Art did not oppose the applicant's request; however, it submitted that its rate for publication in colour of 10,000 copies of a promotional calendar is $642 for the cover, and $428 for each insert. This is confirmed by the rate schedule approved by the Board of Directors of Vis-Art in June 1989. The licensing body also submitted that inquiries directed to several commercial illustrators had confirmed that they would charge a fee of between 50 to 100 per cent of the cost of the original job for the reproduction of a commercial illustration.

The applicant offered to put the amount of $750 in trust for a period of 3 years, at which time any remaining funds would revert to it. Counsel for the applicant did not contend that the rate suggested by Vis-Art was unreasonable. He asked for an opportunity to establish whether or not these rates were representative of the rate that would actually be charged in the present circumstances, as well as to make submissions as to the total amount that should be paid given the possibility that some of the works might have entered into the public domain.

This application raises several interesting issues. These cannot be fully addressed by the Board in time to allow the applicant to go to press by today, Friday, August 24, 1990, as is its intention. However, the wording of subsection 70.7(2) of the Act, which grants the Board the power to fix the terms and conditions of the licence the applicant requests, are wide enough to allow the Board to address the situation promptly while reserving its final decision on some of the details raised by the application. Therefore, the Board grants to the applicant the licence it has requested. The reasons for some of the elements of the order are as follows.

A) The expiry date of the licence.

The applicant would have preferred that the licence remain in effect until June 1, 1991, so as to allow sufficient time to complete the distribution of the calendars. The Board finds it unnecessary that the licence remain in effect until that date, since distribution is not "an act mentioned in section 3", for which the Board is authorized to issue a licence under section 70.7 of the Act.

B) The cost of the licence.

Unless the applicant provides evidence to the contrary, the Board considers it ought to regard the Vis-Art rate schedule as both reasonable and representative of industry practice.

C) The holding in trust of the funds and the disposition of unclaimed funds.

The Board believes that the "terms and conditions" provision contained in subsection 70.7(2) of the Act allows it to make use of any device that will protect the interests of the unlocatable copyright owners without imposing an undue burden on the applicant.

Subsection 70.7(3) of the Act does provide unlocatable copyright owners with a remedy where a licensee does not pay the amount the Board's licence provides for. Even so, the Board intends to minimize the number of occurrences where copyright owners would have to avail themselves of this right. This is the reason for ordering the payment of the amounts into a trust fund, a measure suggested by the applicant itself. In the meantime, the Board is prepared to consider arguments as to:

i) the manner in which the funds should be held;

ii) the manner in which any funds unclaimed by January 1, 1996, might be disposed of;

iii) whether the applicant ought to be allowed to post a bond for the above-mentioned amount, rather than holding that amount in trust.

The issue of who should hold the monies in trust is a more delicate one. Given the circumstances of the case, the Board has little difficulty in leaving this amount in trust with the applicant's solicitors, at least for the time being. In time, the Board intends to hold a hearing on the principles that should govern the issuance of licences under section 70.7 of the Act. At this hearing, the Board will consider which might be the best approach to holding such monies and disposing of them if they have not been claimed by the copyright owners within the five-year period provided in subsection 70.7(3). Among the options the Board might consider would be

.requiring that a bond be posted;

.leaving the funds with the applicant (directly or in trust with their solicitor) to be paid out when a copyright owner is identified;

.holding the funds in trust with a licensing body, or a group of licensing bodies;

.allowing unclaimed funds to revert to the applicant;

.directing that unclaimed funds be paid to a licensing body for use in locating other copyright owners.

D) Other issues on which the applicant is allowed to provide further evidence or argument.

A number of factors might colour the decision the Board will make on the manner in which the funds ought to be disposed of in the present case. The applicant should be allowed to speak to these issues. What follows is a brief description of some of these issues and an indication of how they might be addressed.

i) Whether some of the works might be in the public domain.

Any of the works whose author died before September 1940 would now be in the public domain; the applicant is entitled to make free use of them.

The Board made some inquiries in this regard to Statistics Canada. It appears that if each work had been prepared by a different artist, and if these artists had been, on average, 25 years old when they prepared the works, the actuarial probability is that none of the authors would have died before September 1940.

ii) Whether some of the works might fall under the regime provided by section 8 of the Act.

The applicant submitted that if the author of a work had died before September 1965, it would be entitled to act under section 8 of the Act, and that the Board should take this into account in fixing the value of the licence. The Board is willing to hear argument in this regard. However, at least three considerations should be kept in mind.

First, this provision establishes a compulsory licence for the reproduction of a work for sale calculated at 10 per cent of the sale price of the work; this would appear to exclude the present situation.

Second, the Board is unsure whether the licence fee of 10 per cent should be applied to each work, or whether that rate should be shared among all of the works that comprise the calendar.

Third, the same actuarial analysis as referred to above would lead to the conclusion that three of the authors died by September 1965. Accordingly, any section 8 licence would have a minimal impact.

iii) Ownership or industry practice.

Deciding on an application such as this one is, to a large degree, an exercise in speculation. For this reason, the Board believes that it should examine evidence which exists, for the relevant period, of any industry practices or, preferably, those of the applicant, indicating that the applicant acquired the copyright in the works in question.

For example, the Board may decide as a matter of principle not to return to the applicant the sums that remain unclaimed at the expiration of the five-year period within which unlocated copyright owners may collect the royalties fixed by the Board. Even so, if it was established that a certain portion of magazine covers were previously produced by staff artists, the Board could consider returning to the applicant that portion of the licence fee. Of course, were the applicant to establish that he or she is the actual owner of the copyright in one of the works, the amount pertaining thereto would immediately revert to that applicant, were it only in view of the provisions of subsection 70.7(3) of the Act.

E) Intervenor

Vis-Art is granted status as an intervenor in these proceedings.

The licence granting the application is attached to this order.

Philippe Rabot
Secretary to the Board